STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD
PO Box 15126
Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: NOVEMBER 02, 2022

IN THE MATTER OF:
Appeal Board No. 624665

PRESENT: JUNE F. O'NEILL, MEMBER

The Department of Labor issued the initial determination, holding, effective January 10, 2022, that the wages paid to the claimant, a professional employee of an educational institution, cannot be used to establish a valid original claim during the period between two successive academic terms, on the basis that the claimant had reasonable assurance of performing services at the educational institution in the next academic term pursuant to Labor Law § 590

(10). The claimant requested a hearing.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the employer. By decision filed June 27, 2022 (), the Administrative Law Judge overruled the initial determination.

The employer appealed the Judge's decision to the Appeal Board. The Board considered the arguments contained in the written statement submitted on behalf of the employer.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant has worked as an adjunct assistant professor of English for the employer, a college, for over thirty-three years. His employment is subject to a union contract.

The college operates on an academic year basis with a fall and a spring

semester. In the fall semester, which began on August 26, 2020, and ran through December 20, 2020, the claimant taught two English courses, for six credits each, with two additional professional hours, for 120 hours per semester, at $100.27. per hour. The spring semester began on January 29, 2021, and ran through May 25, 2021, and the claimant again taught two courses, six credits each, with two additional professional hours for 120 hours, at $100.27 per hour.

At a union meeting prior to May 2021, the union representative told the claimant and other members that despite the employer's assurances, classes could still be cancelled due to low enrollment. This representative also indicated that adjuncts were not being rehired.

On May 25, 2021, the interim Dean of the employer's School of Liberal Arts, sent the claimant a letter offering him a three-year academic year reappointment as an adjunct. The letter indicated that he was reappointed in the Department of English for the fall and spring semesters for the academic years of 2021-2022, 2022-2023, and 2023-2024, and that he would be paid $100.27 per hour. He would be assigned at least 6 contact hours each semester and his assignments were not subject to the sufficiency of registration, changes in curriculum and financial ability. He would also receive an additional teaching hour per week for office hours. The letter did not specify the specific courses to be taught. The employer would notify the claimant of his class assignments at the beginning of the semester. The claimant signed and returned this letter to the employer.

The employer's witness at hearing is an English professor for the employer's college. She was appointed the acting chair/chairperson elect for the employer's English Department in January 2022 and did not sign the employer's letter of May 2021. She bore no first-hand knowledge of the claimant's employment history, courses he taught, or his earnings. She was unaware of the credit hours that the claimant had been assigned in the fall of 2021, prior to her appointment as chairperson, and was unaware of changes made to any assigned courses due to contingencies. The employer's witness had no knowledge of when the claimant would have been notified about the classes he was scheduled to teach, how classes were assigned, and what alternative duties, if any, he would be offered if the employer failed to provide sufficient classes/hours. The employer's witness did not know whether revisions had been made to the teaching contracts relevant to the claimant's employment or when a new contract year had begun.

OPINION: New York Labor Law § 590 (10) requires that the weeks and wages

earned by an employee in a professional capacity for an educational institution be disregarded for purposes of determining whether such an employee is eligible to file a valid original claim for benefits during a period between academic terms or years if such employee had reasonable assurance of returning to work for an educational institution in the following semester or academic year. Reasonable assurance exists when an employing educational institution expresses a good-faith willingness to rehire a professional employee of an educational institution for the upcoming school year or term and the terms and conditions of the offer are not substantially less favorable to the claimant than in the prior year or term. It is the responsibility of the employer to demonstrate with competent testimony from knowledgeable witnesses concerning the employer's personnel practices and procedures that these basic conditions have been met. Absent proof that these conditions have been satisfied there is no reasonable assurance of employment in instructional capacity.

The United States Department of Labor Employment & Training Administration Unemployment Insurance Program Letter (UIPL) 5-17, dated December 22, 2016, gives further guidance with respect to interpreting the meaning of reasonable assurance under § 3304 (a)(6)(A)(i) - (iv) of the Federal Unemployment

Insurance Tax Act (FUTA). Pursuant to UIPL 5-17, in order for a claimant to have reasonable assurance in the following year or term, the offered employment must satisfy three prerequisites: (1) the offer of employment may be written, oral, or implied, and must be a genuine offer; that is, an offer made by an individual with actual authority to offer employment; (2) the employment offered in the following year or term, or remainder of the current academic year or term, must be in the same capacity; and (3) the economic conditions of the job offered may not be considerably less in the following academic year or term (or portion thereof) than in the first

academic year or term (or portion thereof). The Department interprets "considerably less" to mean that the economic conditions of the job offered will be less than ninety percent of the amount the claimant earned in the first academic year or term. To establish that there is reasonable assurance, the employer must demonstrate that the basic conditions of hire can be met through competent testimony and evidence from a knowledgeable witness

concerning the employer's personnel practices and hiring procedures. (See Appeal Board Nos. 604638, 603168, 602352 and 569239 A).

The credible evidence fails to establish that the employer gave the claimant reasonable assurance of continued substantially similar employment in the 2021-2022 academic year. Although the claimant acknowledged receipt of the employer's letter of May 2021, his acknowledgment, alone, fails to demonstrate reasonable assurance. We find the employer's letter insufficient to confer reasonable assurance because it lacks specificity as to the actual academic courses that the claimant was expected to teach, the precise number of credit hours he would be teaching, and any language indicating that the claimant would be expected to earn not less than 90 percent of his earnings in the 2021-2022 academic year, as compared to the previous year. We note that the claimant bears no first-hand knowledge of the actual intent of the Dean of the School of Liberal Arts with respect to rehiring him, or if the Department was in fact capable of rehiring him. (See Appeal Board No. 604638). Even the claimant's assumptions, based on past practices, do not satisfy the requirements of the statute that the employer must make an offer of reasonable assurance to the claimant for the next year or term. (See Appeal Board No. 569239A). Without such specific information from the letter, the Board cannot determine whether the employer intended to offer the claimant substantially the same financial terms and conditions in the Spring of 2022, as was afforded the claimant in the Fall of 2021.

Furthermore, the employer's witness, the interim chairperson of the English Department, bore no first-hand knowledge of the hiring practices and procedures, nor did she possess first-hand knowledge of the claimant's actual employment. This witness was appointed chair of the English Department in January 2022, well after the letter at issue was sent. Her knowledge of the letter and details of the claimant's employment were derived from records of which she had no personal knowledge so to be able to authenticate said documents. At times, she conceded that her testimony would be mere speculation. Therefore, this witness, without the requisite competency, cannot establish the contingencies upon which the claimant's employment assignments would depend. Consequently, we may not rely on the employer's witness' testimony that the claimant had been given reasonable assurance of continued substantially similar employment for the period effective January 10, 2022. Accordingly, we conclude that the exclusionary provisions of Labor Law § 590

(10) do not apply.

DECISION: The decision of the Administrative Law Judge is affirmed.

The initial determination, holding, effective January 10, 2022, that the wages paid to the claimant, a professional employee of an educational institution, cannot be used to establish a valid original claim during the period between two successive academic terms, on the basis that the claimant had reasonable assurance of performing services at the educational institution in the next academic term pursuant to Labor Law § 590 (10), is overruled.

The claimant is allowed benefits with respect to the issues decided herein.

JUNE F. O'NEILL, MEMBER